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YAP CHIEW GUAN

v.

THE TRUSTEE OF THE ESTATE OF YEAP CHOR EE, DECEASED

b

HIGH COURT MALAYA, PENANG
DATO' ABDUL HAMID BIN HJ. MOHAMAD J
[CIVIL APPEAL NO. 16-4-86]
20 APRIL 1995

c

LAND LAW: *Mortgage of land to respondent - Rentals collected by respondent from tenants since 1946 - Claim by respondent under s. 53 NLC (Penang and Malacca Titles) Act 1963 - Appellant claiming right to redeem land - Whether respondent had acquired a pre-existing interest by adverse possession pursuant to s. 44 of the Code - Whether appellant's right to redeem extinguished by s. 16 Limitation Act 1953.*

WORDS & PHRASES: "pre-existing interest" - Section 4 National Land Code (Penang and Malacca Titles) Act 1963.

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The respondent is the trustee of the estate of Yeap Chor Ee (Yeap). On 27 April 1987, the land in question was mortgaged to the deceased by the registered owner but the same was never redeemed. Rentals were collected from tenants of two houses on the land since 1946 on behalf of Yeap and upon his death in 1952, on behalf of his estate. On 2nd July 1977, the respondent made a claim under s. 53 of the National Land Code (Penang and Malacca Titles) Act 1963 (the Code) to the Commissioner of Land Titles, Penang. The appointed day, pursuant to s. 88 of the Code, after which the title would become indefeasible, was fixed on 1 January 1966. The claim was dismissed and the respondent appealed to the Land Titles Appeal Board which allowed the appeal. The appellant appealed against this decision and claimed a right to redeem his land.

e

The issues were whether the respondent had a pre-existing interest in the land acquired by adverse possession within the provisions of s. 44 of the Code and whether the appellant's rights as mortgagor had been extinguished by s. 16 of the Limitation Act 1953.

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Held:

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[1] "Pre-existing interest" in s. 4 of the Code means all interests, rights, titles and estates (not vested in the Yang di-Pertua Negeri or the Government of the State) subsisting immediately before the appointed day in any land in the State, including any title therein acquired by adverse possession or operation of law or under any unregistered pre-existing deed. In the present case, the mortgagees have been collecting rent from the tenants since 1946 and have also paid quit rent for a considerable period of time. Therefore the mortgagee and after his death, the respondent had adverse possession of the land.

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[2] Time begins to run against the mortgagor from the time the mortgagee enters into possession, whether or not the right of redemption has arisen. The respondent has been in possession of the property for more than 12 years before the appointed date and accordingly the appellant's right to redeem is time barred.

[Appeal dismissed with costs].

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Cases referred to:

Four-Maids Ltd. v. Dudley Marshall (Properties) Ltd., [1957] 1 Ch. 317 (refd)
Ismail bin Ishak v. Hashim bin Che Mat & Anor [1983] 1 MLJ 385 (refd)
In re Metropolis and Counties Permanent Investment Building Society [1911] 1 Ch 698 (refd)

Legislation referred to:

Limitation Act 1953, s. 16
National Land Code (Penang and Malacca Titles) Act 1963, ss. 4, 44, 53, 88

Other sources referred to:

The Law of Real Property, Robert Megarry & H.W.R. Wade, 5th Edn., p. 942
Emmet on Title, 18th Edn., p. 783
Halsbury's Laws of England, 4th Edn., Vol. 28 para. 787
Law of Mortgages, Waldock p. 196

For the appellant - Yeap Chye Choo; M/s. Zainal Azahar & Co.
For the respondent - Karin Lim Ai Ching; M/s. Presgrave & Matthews

JUDGMENT

Abdul Hamid bin Hj. Mohamad J:

The present respondent made a claim under s. 53 of the National Land Code (Penang and Malacca Titles) Act 1963 (the Code) to the Commissioner of Land Titles, Penang. The claim in Form E was filed on 2 July 1977. The Code fixed 1 January 1966 as the appointed day. Section 88 of the Code provides:

88. (1) When on the expiration of the period of twelve years next following the appointed day, which period the State Authority may, by notification in the Gazette, from time to time extend by such further period as the State Authority may consider necessary, the title to any holding has not been duly examined pursuant to this chapter, such title shall, on and from such date, become indefeasible within the meaning of the National Land Code.

Provided that when at such time any caveat or claim presented or made under this Act is then outstanding, no such title shall become indefeasible until such caveat or claim has been disposed or withdrawn.

Twelve years from the appointed date ends on 1 January 1978. As has been pointed out the respondent filed his claim on 2 July 1977 which was within his period of twelve years from the appointed date (1 January 1966). However by virtue of Gazette notification dated 18 August 1977 (Penang PU 29), the State Authority of Penang extended the indefeasibility period by a further period of eight years commencing from 1 January 1978 to 31 December 1985.

The Commissioner dismissed the respondent's claim. The respondent appealed to the Land Titles Appeal Board which allowed the appeal. The appellant appealed to this Court.

The facts were not in dispute. The respondents are the Trustees of the Estate of Yeap Chor Ee. By an indenture dated 27 April 1987 the registered owner of the land had mortgaged the said land to the late Yeap Chor Be for RM8,000. The mortgage was never redeemed. Rentals have been collected from the tenants of the two houses standing on the said land since 1946 to date on behalf of Yeap Chor Ee and upon his death on 1952 on behalf of his estate. The respondents relied on s. 16 of the Limitation Act 1953 and s. 44 of the National Land Code (Penang and Malacca Titles) Act 1963.

The Board, in reversing the decision of the Commissioners was of the view that s. 16 of the Limitation Act 1953 had extinguished the mortgagor's (appellant's) right to redeem

- a* his land. The respondent having shown that he had been in possession since 1946 therefore had a pre-existing interest under s. 44 of the 1963 Act.

Section 44 of the Code provides:

- b* 44. Where any pre-existing interest in a holding has been acquired by adverse possession and the right of action accruing in respect of such possession has been barred by the Limitation Act 1953, then such form of replacement title as is referred to in s. 39 shall be issued, or such replacement interest shall be endorsed on the appropriate folio of the Interim Register, as the Director may consider appropriate to accord due recognition to such interest.

As can be seen there are two limbs to s. 44: firstly whether a pre-existing interest in a holding had been acquired by adverse possession; secondly, whether the right of action accruing in respect of such possession has been barred by The Limitation Act 1953.

- c* “Pre-existing interest” is defined by s. 4 of the Code to mean:

“pre-existing interests” means all interests, rights, titles and estates (not being interests, rights, titles or estates vested in the Yang di-Pertua Negeri or the Government of the State) subsisting immediately before the appointed day in any land in the State, including any title therein acquired by adverse possession or operation of law or under any unregistered pre-existing deed.

- d* As the land in question is the subject matter of a mortgage, it is important to see what right a mortgagee has in law. In this case, the English law is applicable as this mortgage was made long before the National Land Code came into force. According to *The Law of Real Property* by Robert Megarry and H.W.R. Wade, 5th Edition at page 942:

- e* Since a legal mortgage gives the mortgagee a legal estate in possession, he is entitled, subject to any agreement to a contrary, to take possession of the mortgaged property as soon as the mortgage is made, even if the mortgagor is guilty of no default ... If the property was already let to a tenant before the mortgage was made, or if subsequent lease is binding on the mortgagee, the mortgagee cannot take physical possession; but he may take possession by directing the tenants to pay their rents to him instead of to the mortgagor. After entry by a mortgagee his right to possession dates back to the time at which his legal right to enter accrued. He can therefore bring an action for trespass committed before the entry.

- f* In *Four-Maids Ltd. v. Dudley Marshall (Properties) Ltd.*, [1957] 1 Ch. 317 the head note, *inter alia* reads as follows:

A mortgagee, unless precluded by some term expressed or implied in the mortgage, has a right at any time to go into possession of mortgaged property by virtue of the legal interest he has therein, whether or not any payment under the mortgage is outstanding.

- g* In *Emmet on Title*, 18th Edition at page 783, the learned author says:

‘Possession’ would appear to include receipt of the rents and profits from a tenant; that is the normal meaning of the word.

In *Halsbury’s Laws of England*, 4th Edition Volume 28 para 787 the learned authors say:

- h* If a mortgagee of land subject to a lease receives the rent reserved for twelve years, his receipt of the rents amounts to adverse possession of the mortgaged land, and the mortgagor’s right to redeem is barred. The mortgagee thus gains a title to the reversion as against the tenant who makes the payment.

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Ismail bin Ishak v. Hashim bin Che Mat & Anor. [1983] 1 MLJ 385 also shows that adverse possession can be obtained even though such possession was obtained legally or with the consent of the owner. **a**

In the present case, the mortgagees have been collecting rents from the tenants since 1946 and have also been paying quit rents for a considerable period of time. On the authorities referred to earlier I agree with the finding of the board that the mortgagee Yeap Chor Ee and after his death, the respondents had possession adversely to the mortgagor. **b**

We next come to the second question i.e. whether the right of action accruing in respect of such possession has been barred by the Limitation Act 1953.

Section 16 of Limitation Act 1953 provides as follows:

16. When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him: **c**

Provided that when a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges in accordance with the provisions of s. 27 of this Act the title of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the expiration of twelve years from the date of the payment or acknowledgment. **d**

I agree with the submission of learned Counsel for the respondent that time begins to run against the mortgagor at once from the time the mortgagee entered into possession, whether or not the right of redemption has yet arisen - see *Law of Mortgages* by Waldock page 196, *In re Metropolis and Counties Permanent Investment Building Society* [1911] 1 Ch 698. **e**

It is clear in this case that the respondent had been in possession of the mortgaged property for more than 12 years before the appointed date and that the right of action accruing in respect of such possession had been barred by the provisions of Limitation Act 1953. By virtue of s. 44 of the Code it is clear that the respondent has obtained a title as against the appellant. **f**

The appeal is dismissed with costs.

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